Supreme Court, U.S.
FILED
FEB 12 1999
CLERK

No. 98-1074

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

CITY OF SANTA BARBARA,

Petitioner,

v.

VICKIE L. EDWARDS, KATHLEEN ROSE MCCULLEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

DANIEL J. WALLACE
CITY ATTORNEY
Counsel of Record
JANET K. MCGINNIS
ASSISTANT CITY ATTORNEY
Post Office Box 1990
Santa Barbara, CA 93102-1990
(805) 564-5331

Attorneys for Petitioner

REPLY TO BRIEF IN OPPOSITION

The City has petitioned from a final order: *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998). In this final decision the Ninth Circuit categorically rejected an ordinance's eight-foot step back provision under any circumstances for any facilities based on an erroneous interpretation of *Schenck* and equation of the "burden no more speech than necessary" test of an injunction for the "narrow tailoring" test of an ordinance.

The Petition suffers no jurisdictional defect. *Edwards* raises the Question Presented. The Ninth Circuit's rationale is not limited to the ordinance's eight-foot step back provision in the access area of a place of worship.

> With respect to the floating buffer zone, our decision in *Sabelko*, invalidating an eight-foot buffer zone on the grounds that it is not narrowly tailored, is dispositive. Like the provision challenged here, the invalidated buffer zone could be invoked within one hundred feet of a clinic. Unlike the ordinance challenged in *Sabelko*, Santa Barbara's ordinance has a severability clause. We, therefore, need not invalidate the entire ordinance. *See Sabelko*, 120 F.3d at 165.

Edwards, 150 F.3d at 1217 (emphasis added).[1]

---

[1]The Ninth Circuit seemingly knew that technically it was not reviewing the injunction against the step back provision at clinics, which was entered after it decided *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997)("*Sabelko II*"). *Edwards*, 150 F.3d at 1215-16 & n.5.

The Opposition criticizes the Petition's imprecision in framing the Question Presented. A pending later-filed City appeal challenges the subsequent injunction against the ordinance's identical provision for clinics. The Petition identified this appeal. Petition, p.7: 1-4. However, this Petition seeks review of the Ninth Circuit's categorical rejection of such regulations even though it recognized that the Court has found sufficient the three City interests served by these regulations at clinics and places of worship: (1) protecting persons seeking medical services or engaging in worship from harassment and intimidation; (2) ensuring access to medical facilities and places of worship; and (3) ensuring traffic safety. *Id.* at 1216.

The Ninth Circuit's categorical rejection is raised in *Edwards* and the Court may and should grant review. The Ninth Circuit affirmed the injunction against the City's step back provision with little discussion, finding despositive its holding that a Phoenix ordinance creating a step back buffer at clinics was unconstitutional. *Id.* at 1217.

It is timely for the Court to review the Ninth Circuit's rejection of all ordinances creating step back provisions based on *Schenck*'s use of the injunction test to find unconstitutional an injunction's different and broader moving buffer.[2]

---

[2] In *Sabelko II*, the Ninth Circuit relied on *Schenck*, which rejected a moving fifteen-foot unlimited access area injunction:

> Because this broad prohibition "floated", the Court determined that demonstrators would have difficulty determining how to comply with the injunction. . . . (Citation omitted) The Court concluded that this lack of certainty about how to comply with the injunction created a substantial risk that more speech would be burdened than the injunction prohibited. Because other means might exist which would protect governmental interests and provide certainty regarding compliance, the Court held that the floating buffer zones burdened more speech than was necessary. (Citation omitted) The Phoenix ordinance suffers the same defects as the injunction in *Schenck*. . . . This uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits. As such, the Phoenix ordinance lacks the narrow tailoring necessary to survive our scrutiny. (N.3. Because we find that the Phoenix ordinance is not narrowly tailored, we need not decide whether it "leave[s] open ample alternative channels of communication." *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753.)

Sabelko II, 120 F.3d at 165.

This Petition's requested review will inform the Ninth Circuit and other courts how to apply *Schenck* to legislation creating different, more limited regulations that serve important interests to ensure necessary access to facilities for the exercise of First Amendment rights.

In reply to Respondents' objection, however, the City hereby amends this Petition's Question Presented:

> Whether an ordinance that prohibits impeding or hampering another's access to a facility to exercise First Amendment rights by requiring a person to step back eight feet upon a specific request within a limited access area is a constitutional time, place, and manner regulation.

CONCLUSION

Granting this Petition will advise cities and courts of the constitutional limits of legislation using a narrow moving zone of separation to redress conflicts between competing and equal First Amendment rights.

Respectfully submitted,

DANIEL J. WALLACE
CITY ATTORNEY
Counsel of Record
JANET K. McGINNIS
ASSISTANT CITY ATTORNEY
Post Office Box 1990
Santa Barbara, CA 93102-1990
(805) 564-5331

Attorneys for Petitioner